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No. 87-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,

Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL, and EDWIN MEESE III, ATTORNEY GENERAL,

Respondents.

OLIVER L. NORTH,

Petitioner,

v.

EDWIN MEESE III, ATTORNEY GENERAL, and LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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Respondents do not seriously contend that the issue presented in the petition—whether the target of an unlawful federal criminal investigation is absolutely

barred from seeking declaratory or injunctive relief from that investigation in federal court—is not a significant one warranting this Court's attention. Instead, they maintain (1) that prior court decisions already have resolved the merits of petitioner's claim; and (2) that the decision below is not at odds either with this Court's prior rulings, or with decisions of other courts of appeals. As to the first point, respondents are flatly wrong. As to the second point, the ruling below broadly expands existing limits on access to a federal forum to vindicate constitutional claims and cannot so simply be dismissed.

1. Respondents contend that in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied*, —— U.S. —— (1988), the court of appeals ruled that Independent Counsel Lawrence E. Walsh "is authorized by the Attorney General's appointment to conduct the Iran/Contra investigation," Brief for the Attorney General in Opposition ("A.G. Brief") at 7. Thus, respondents maintain, the premise of petitioner's request for equitable relief—that the investigation by respondent Walsh is unlawful—no longer exists. *See id.*; Brief for Respondent Lawrence E. Walsh ("Walsh Brief") at 14-17.

The authority of respondent Walsh has not, however, been "definitively upheld." Walsh Brief at 15. The court of appeals' ruling on which respondents rely *expressly* limited its scope to the independent counsel's authority to issue "the specific subpoena with which [petitioner] refused to comply." *In re Sealed Case*, *supra*, 829 F.2d at 62 n.60. The court refused to consider the lawfulness of the entire delegation of authority by the Attorney General to Mr. Walsh, but instead narrowly considered solely the lawfulness of the delegation of authority to cause issuance of the subpoena at bar. The court declined to consider petitioner's broader claim, stating that petitioner "may not rely upon the fortuitous circumstance of receiving that subpoena to effect an end run around the rule we announced in *Deaver* v. *Seymour* and in so doing

challenge the entire investigation." *Id.* It is therefore baseless to argue that petitioner's challenge to "the entire investigation" was resolved in that case.[1]

2. Despite respondents' suggestion otherwise, petitioner has not and does not claim a right to equitable relief from an indictment. *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987) held that the Federal Rules of Criminal Procedure provide a remedy for wrongful *indictment*, and petitioner takes no issue with that holding here. Those rules, however, provide no remedy for injury of the kind petitioner complains.[2] As the petition estab-

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[1] Moreover, before the Attorney General's regulation was promulgated, petitioner filed a separate action challenging the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.* Respondent Walsh still purports to be acting under that authority, even though at least one court of appeals now has held that Act to be unconstitutional. *In re Sealed Cases*, Nos. 87-5261, 5264 and 5265 (D.C. Cir. Jan. 22, 1988), appeal docketed, No. 87-1279 (Feb. 1, 1988). Whatever the merits of petitioner's *subsequent* challenge to the Attorney General's regulation, respondent Walsh's exercise of authority under the Act remains—as does the "premise" of petitioner's claim.

Indeed, respondent Walsh is incorrect to assert that petitioner is not entitled to the relief sought because his authority has already been upheld. There is a vast difference between a ruling upholding respondent's authority to issue a subpoena when he purportedly had authority pursuant to both the Act and the regulation, and a ruling that his conduct under the Act cannot be challenged even when that Act was his *sole* source of authority. In the latter case, the subsequent promulgation by respondents of a regulation revocable at will—even if valid—cannot serve to moot petitioner's challenge to the exercise of authority under the Act. *See United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

[2] The Brief for the Attorney General gives the court of appeals' ruling a narrower reading than it can tolerate. Petitioner did not allege, as his only injury, that "he is the subject of an investigation headed by a public official who is allegedly without authority to conduct the investigation." A.G. Brief at 7. Far from it, petitioner challenged the exercise by an otherwise private attorney of coercive law enforcement powers unlawfully delegated to him and the use of

lishes, petitioner seeks equitable relief not from a possible future indictment, but from the independent counsel's current unlawful use of his authority to compel disclosure of personal information, such as tax returns, to coerce compliance with subpoenas by persons in privity with petitioner, and to disclose confidential matters to Congress and the press. Like the chilling effect of a criminal investigation conducted in violation of the First Amendment, the present injury arising out of these unlawful intrusions cannot ever be remedied by dismissal of an indictment.

Respondents' efforts to distinguish *Olagues* v. *Russoniello*, 797 F.2d 1511 (9th Cir. 1986) (*en banc*), *cert. granted*, 107 S. Ct. 1885 (1987), *vacated and remanded as moot*, 108 S. Ct. 52 (1987), and *Smith* v. *Meese*, 821 F.2d 1484 (11th Cir. 1987), therefore fall short. *Olagues* and *Smith* are notable not because they involve the First Amendment but because they involve allegations of injury arising from a federal criminal investigation that will not be remedied at a later date by dismissal of a possible indictment. Precisely the same is true of the injuries flowing from the placement of coercive law enforcement authority in the hands of persons with no lawful authority whatsoever—persons who are unhinged from the institutional wisdom and restraint of the Executive Branch. Respondents offer no reason whatsoever—no principles of comity or separation of powers—*why* federal courts should close their doors to such claims of unlawful and intrusive police power.[3]

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those powers to, among other things, compel disclosure of private information to which he otherwise had no right of access. The Attorney General ignores the difference between being the "mere" subject of an investigation and being the subject of repeated, intrusive incursions into one's personal affairs.

[3] Respondents and the court of appeals charge that petitioner seeks to enjoin the actions of a grand jury, as had movant in *Deaver* v. *Seymour*, 822 F.2d 66 (D.C. Cir. 1987). In fact, petitioner has sought to assure only that properly authorized persons participate

3. Finally, respondents' efforts to rewrite *Younger* v. *Harris*, 401 U.S. 37 (1971), into a decision based on equitable principles alone, and not comity, is misplaced. As recently as in *Pennzoil Co.* v. *Texaco, Inc.*, —— U.S. ——, 107 S. Ct. 1519, 1525 (1987), this Court reaffirmed the dual basis for the *Younger* decision and quoted that opinion's federalism discussion at length in the context of a case involving federal court interference with state court proceedings. Respondents' need to rely on that case to defend the court of appeals' holding regarding federal court interference with a federal criminal investigation merely demonstrates the lack of support, in this Court's jurisprudence, for the ruling below.

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted.

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in the conduct of the grand jury or share in the exercise of its extraordinary powers. There has never been a suggestion, for example, that a grand jury could not proceed under the direction of the U.S. Attorney for the District of Columbia.